

THE HONORABLE JAMES L. ROBART

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

CALIFORNIA EXPANDED METAL
PRODUCTS COMPANY, a California
corporation; and CLARKWESTERN
DIETRICH BUILDING SYSTEMS LLC,
dba CLARKDIETRICH BUILDING
SYSTEMS, an Ohio limited liability
company,

Plaintiffs,

v.

JAMES A. KLEIN, an individual;
BLAZEFRAME INDUSTRIES, LTD., a
Washington company; and SAFTI-SEAL,
INC., a Washington company,

Defendants.

CASE NO. 2:18-cv-00659-JLR

PLAINTIFFS' TRIAL BRIEF

The Honorable James L. Robart
Courtroom 14106

Plaintiffs California Expanded Metal Products Company ("CEMCO") and Clarkwestern Dietrich Building Systems LLC ("ClarkDietrich") (together, "Plaintiffs") respectfully submit this Trial Brief for the jury trial beginning on December 9, 2019.

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TROJAN LAW OFFICES
BEVERLY HILLS

I. Introduction

Plaintiffs and Defendants James A. Klein (“Klein”) and BlazeFrame Industries Ltd. (“BlazeFrame Ind.”) are all too familiar with each other, as this is the third lawsuit involving these parties. All prior disputes involve the asserted patents related to track products and wall assemblies that are designed to impede the spread of smoke and fire using an intumescent strip. This entire matter can be boiled down to the simple fact that Defendants infringe, or induce infringement of, the asserted patents despite previously selling the technology CEMCO to resolve the prior disputes.

The first litigation between these four parties resulted in a settlement agreement for the sale of six Patents covering the patented technology to CEMCO for [REDACTED] and certain royalties. CEMCO licensed this technology to Plaintiff ClarkDietrich and also permitted Klein and BlazeFrame Ind. to continue to sell the track products covered by the patented technology in a restricted six-state territory. In turn, Klein and BlazeFrame Ind. ignored these restrictions which caused the second litigation.

The second litigation resulted in yet another settlement agreement. This time Klein and BlazeFrame Ind. sold their BlazeFrame trademarks to ClarkDietrich and agreed to cease making and selling track products covered by the six patents previously sold to CEMCO. This should have been the end of the dispute between these four parties, but yet again, Klein ignored the agreement and continues to sell the patented track products under a new company, Safti-Seal, Inc. (“Safti-Seal”).

Now during the third litigation between the parties, Defendants Klein, BlazeFrame Ind., and Safti-Seal (together, “Defendants”) still infringe the asserted patents and cause others to infringe under the guise of making and selling “new” products that include the “Safti-Strip” designed to circumvent the very patents they sold off. Defendants continue to do so even after the Court explicitly found that “[n]evertheless, the court finds that, as a matter of law, the Safti-Strip tape

1 affixed to the accused metal track products is an “intumescent strip” within the meaning of the
 2 Patents” during summary judgment (Dkt. #117 at 19:8-10.) Defendants were forewarned of the
 3 Court’s conclusion during claim construction when the Court concluded earlier in the case on April
 4 17, 2019 that “intumescent strip” means “a strip that comprises a substance that expands when
 5 exposed to heat” and found that “[t]his construction makes clear that the intumescent strip need not
 6 include only an intumescent substance. It is also broad enough to encompass preferred
 7 embodiments in which the strip consists of a composition containing an intumescent substance,
 8 where that composition lies atop a non-intumescent substrate.” (Dkt. #98 at 19:9-14.)

10 Not only do Defendants infringe the patents, they have taken unreasonable litigation
 11 positions¹ including Defendants’ contention that Court excluded all of Plaintiffs’ direct
 12 infringement claims. As the Court clarified, “Defendants’ conclusion that the second portion of
 13 the court’s order on the remaining claim elements ‘ruled that no claim for literal infringement by
 14 any track product remains in the case’ (see Resp. at 5-8) is not reasonable.” (Dkt. #134 at 5:4-6.)

16 Based on the foregoing, Defendants should pay Plaintiffs’ lost profits, or at a minimum, a
 17 reasonable royalty, for their direct, contributory, and induced infringement of the asserted patents
 18 now owned by CEMCO and licensed by ClarkDietrich. Additionally, Defendants should be
 19 enjoined from making and selling the patented SaftifFrame track products and SaftiStrip products
 20 for any use in a track or wall assembly, as they have already been contractually required to do so.
 21 Lastly, because Defendants’ infringement was willful (as of either the Court’s claim construction
 22 order on April 14 or on August 14, 2019 after the Court’s summary judgment order), this is an
 23 exceptional case of warranting an award of enhanced damages and attorneys’ fees to Plaintiffs.

25 _____
 26 ¹ Defendants’ arguments were rejected on numerous occasions, including Defendants’ invalidity
 27 arguments (regarding patents Klein and BlazeFrame Ind. previously owned and assigned away)
 28 and inequitable conduct before the United States Patent and Trademark Office in prosecuting
 their own patents. The Court struck these affirmative defenses under assignor estoppel theories.
 (Dkt. #91.)

II. Statement of Facts

A. Brief Overview of Patents

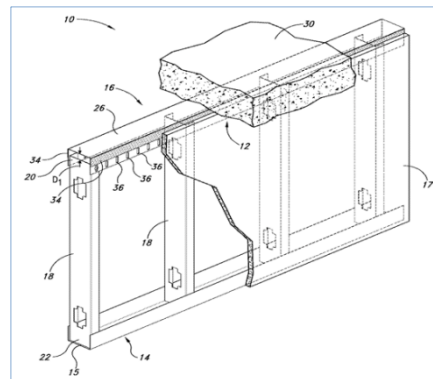
Klein is the sole named inventor of U.S. Patents 7,681,365 (“the ’365 Patent”), 7,814,718 (“the ’718 Patent”), 7,866,108 (“the ’108 Patent”), 8,056,293 (“the ’293 Patent”), 8,136,314 (“the ’314 Patent”), and 8,151,526 (“the ’526 Patent”). Klein assigned these patents to his company BlazeFrame Ind. BlazeFrame Ind. made and sold track products under these patents (referred to as “the BlazeFrame® products”).

The technology at issue in these patents relates to wall assemblies used in the construction of buildings to seal wall construction joints and gaps. A wall assembly includes a horizontal track that is typically made of metal and mounted to a ceiling or floor so that vertical studs can be inserted vertically to frame a wall as depicted below.

Head-of-Wall Assembly



Fig. 1 of the ’365 Patent



The track product is commonly a “U”-shaped track, defined by a web and two side flanges (also referred to as “sidewalls”) that form an upside down “U” shape.

The patents are directed to fire-prevention wall products that prevent smoke and fire from spreading from one side of the wall to the other. The patents all claim either track or wall assemblies having an intumescent strip attached on a sidewall of the metal track, which expands in a fire to seal the gap between the track product and the ceiling to prevent the spread of smoke and fire.

The following patents are at issue in this case: the '365 Patent, the '718 Patent, the '314 Patent, the '526 Patent (the "Asserted Patents"). While all claims are at issue in this case, the following independent claims are representative: (1) Claims 1 and 6 of the '314 Patent and claim 12 of the '718 Patent (directed to track products with slots with an intumescent strip affixed on the track product); and (2) Claim 1 of the '365 Patent, claim 1 of the '718 Patent, and claim 1 of the '526 Patent (directed to the complete wall assembly with an intumescent strip affixed to the track product).

B. The SAFTI-SEAL Products

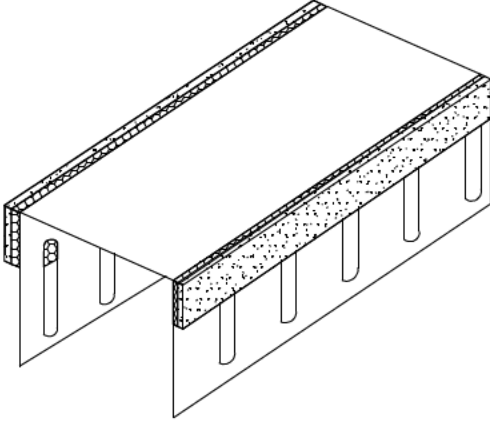
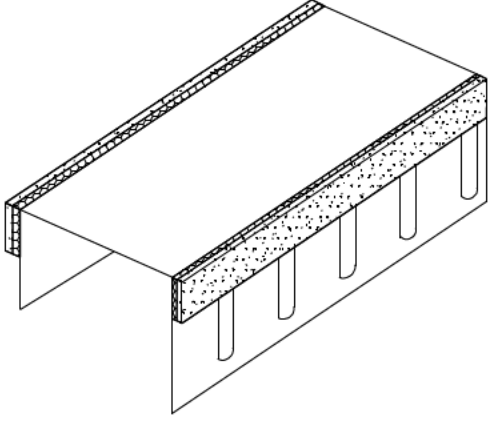
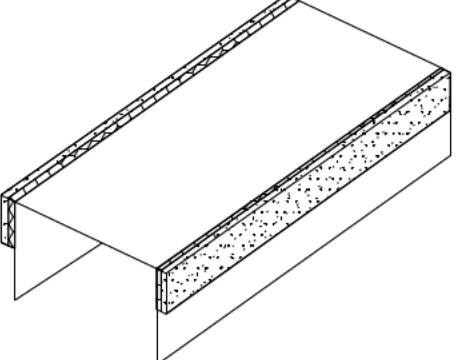
Though patent infringement is to be determined by comparing the accused SAFTI-SEAL products to the asserted patents, it is worth noting that the SAFTI-SEAL track products are virtually the same as the BlazeFrame® track products (previously sold by Klein, BlazeFrame, and ClarkDietrich, but now exclusively made and sold by ClarkDietrich). As Defendants themselves note, the only difference is that the SAFTI-SEAL track products include an additional "thermal barrier":

Plaintiffs and Defendants thus both apply competing fire safety strips onto metal header tracks. Plaintiffs' product is an intumescent strip in the form of a self-adhering 'tape' (commercially available in rolls from Rectorseal under the tradename BlazeSeal), whereas Defendants' product is also a tape product but, unlike Plaintiffs', it consists of an intumescent material glued onto a strip of a thermal insulating material (thermal barrier).

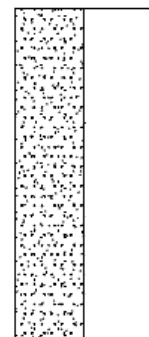
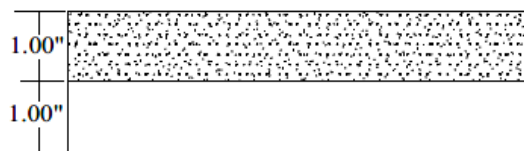
(Defs' Mot. at 14:3-8.)

More particularly, the SAFTI-SEAL track products use the same metal track products as the BlazeFrame® track products. SAFTI-SEAL has UL approvals for all of the same track profiles that ClarkDietrich sells as part of its BlazeFrame products. Thus, SAFTI-SEAL has sold, and sells, SAFTI-FRAME products with the same track profiles, and SAFTI-STRIP for use with the same

track profiles, as ClarkDietrich. The configuration of the web and flanges of the metal track products are the same and are generally U-shaped as follows:

Safti-Seal Product Profile Name	Representative Picture of Profile
PS7 - SaftiFrame "DSL" (Slotted Both Sides) Profiles with two slotted legs	
PS4 - SaftiFrame "SL" (Slotted One Side) Profiles One slotted and One solid leg	
PS1 - SaftiFrame "DL" (Deep Leg) Profiles with two solid legs	

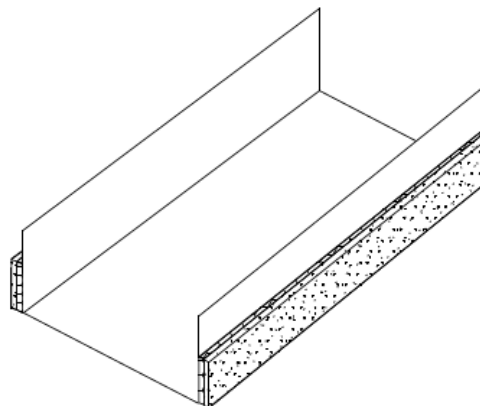
PS13 – SaftiFrame “VT” (Vertical
Joint) profiles with two solid legs



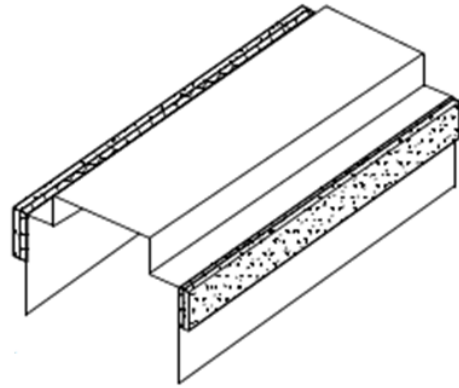
2 - Series (Fire Stop Both Sides)
(W)



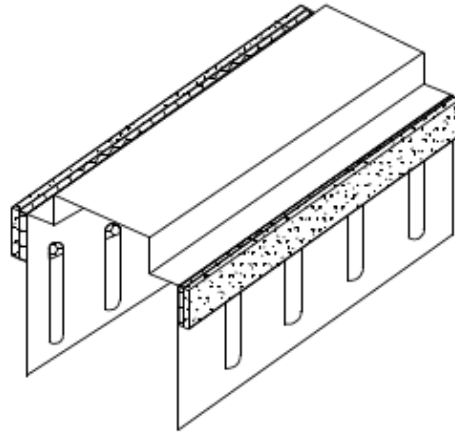
PS36 – SaftiFrame Bottom of Wall



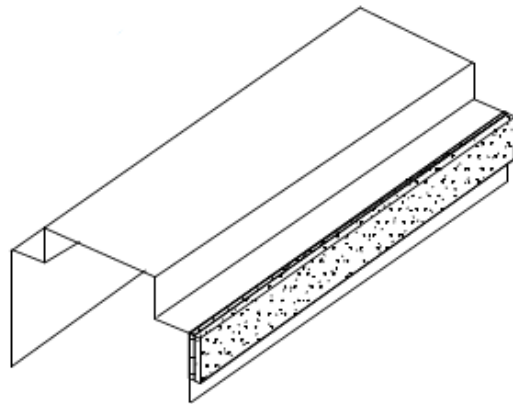
PS10 – SaftiFrame “ODL” (Offset
Deep Leg) Profiles with two offset
solid legs



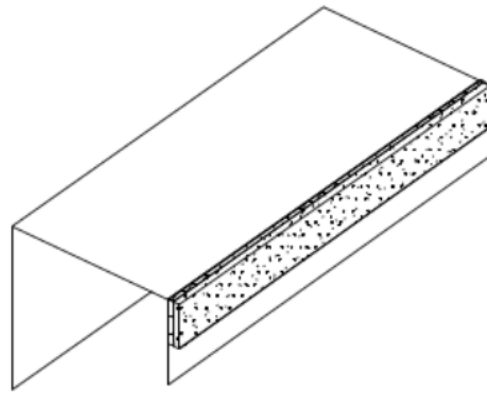
PS11 – SaftiFrame “ODSL” (Offset
Slotted Leg) Profiles with two offset
slotted lower legs



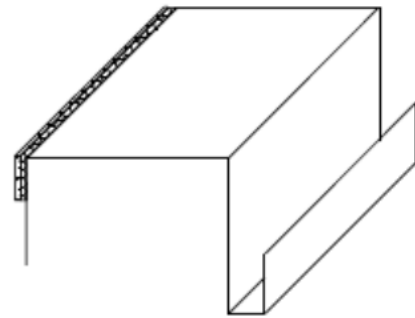
PS12 – SaftiFrame “OJR” (Offset J-
Runner) with one 2” and one 3” solid
legs



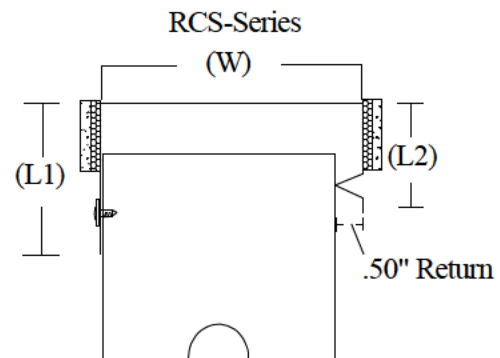
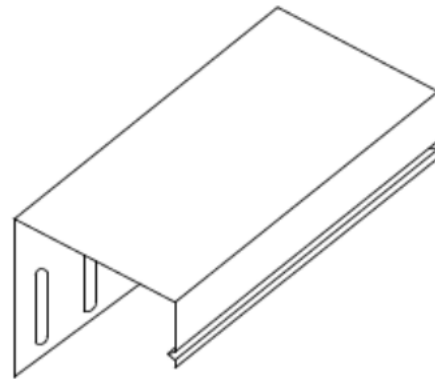
PS27 – SaftiFrame “JR” profiles with
one short (front) and one long (back)
leg



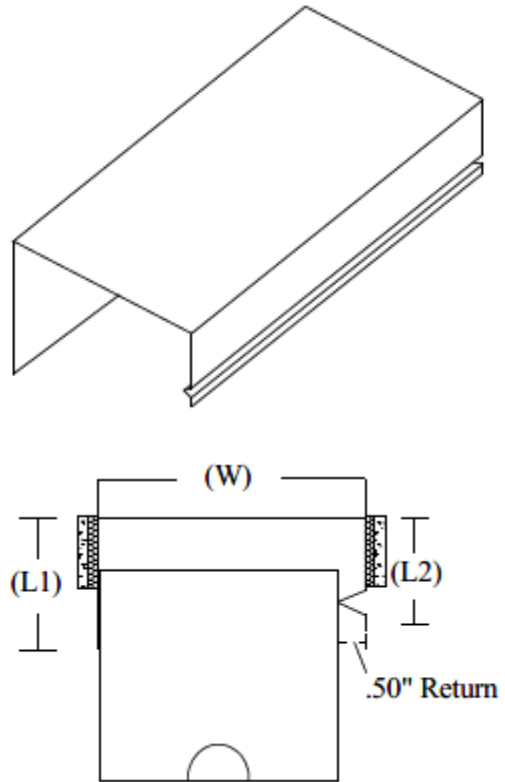
PS61 – “DJR” Double J-Runner
(Shaft Wall) Profile



PS18 – SaftiSeal “RCS” (Slotted Leg
Profile) to Accommodate Resilient
Channel



PS19 – SaftiSeal “RCD” (Deep Leg
Track Profile) to Accommodate
Resilient Channel



The SAFTI-SEAL track products also use the same intumescent material as the BlazeFrame® track products. The location of the intumescent material on the sidewall of the track product (as opposed to another part of the track product) is the same. Defendants’ own photographs show just how similar the two products are:

BlazeFrame Track product



Safti Seal Track product



1 In short, the only difference between these products is the “thermal barrier.”

2 SaftiSeal started selling the accused products as soon as it went into business in 2017. As
3 the named inventor, and assignor, of the Asserted Patents, Klein knew the patents well and
4 understood what their claims covered. Damages accrue from the opening of SaftiSeal, i.e.,
5 September 1, 2017. No Defendant has suggested otherwise.

6 C. The Patented BlazeFrame ProductsClarkDietrich is the exclusive licensee of the
7 Asserted Patents. As such, it has the sole right to practice the patented inventions claimed in those
8 patents, and exercises those rights by making and selling the BlazeFrame products. The patented
9 BlazeFrame products consist of a generally U-shaped metal track, which can be in the shape of
10 one of numerous profiles, with an intumescent strip attached to the side leg or legs of the
11 generally U-shaped track. These BlazeFrame products are used by contractors to fabricate fire-
12 rated wall assemblies typically when building a multi-story building. The BlazeFrame products
13 can be used at the top of the wall as a “header” track, or at the bottom of the wall as a “footer.”

14 1. The Benefits of the Patented Products

15 Among the fire protection provided in buildings is passive fire stopping. Such “passive”
16 fire stopping does not actively suppress a fire, but rather prevents or slows the spread of fire.
17 Before the development of the patented BlazeFrame products, such passive fire stopping products
18 used at the top and bottom of walls were predominantly intumescent caulk and mineral wool.
19 They were applied after the metal wall framing was installed and before the dry wall was applied.
20 Because they were applied separately, different tradesmen with different skills were hired just for
21 the fireproofing task.
22

23 The Asserted Patents provide the ability to install passive fire-proofing without a separate,
24 additional step of applying caulk and/or mineral wool. With the BlazeFrame products, the
25 intumescent material is shipped to the construction site already factory applied to the track
26 product. That track and fire-stopping material is then installed in a single step. Applying the
27 intumescent to the track in the factory ensures that the intumescent is securely adhered to a clean
28

1 steel surface under environmental conditions that ensure better adhesion and that the proper
2 amount of intumescent is provided to a given area of track. UL's inspectors regularly inspect
3 ClarkDietrich's numerous facilities where it manufactures the BlazeFrame products to ensure
4 ClarkDietrich maintains its rigorous quality control over this application process.

5 2. ClarkDietrich's History with the BlazeFrame Products

6 a. The License Agreements

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
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5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 b. ClarkDietrich Built the Market for the Patented Products

10 Since 2012, ClarkDietrich has invested millions of dollars in building product recognition
11 and acceptance particularly among architects, who specify the method of fire-proofing for a
12 particular wall assembly. ClarkDietrich has been methodical about its promotional efforts for the
13 BlazeFrame products. As part of these efforts, it has hosted hundreds of educational sessions with
14 architects and contractors, teaching them about the benefits of the patented products. When the
15 BlazeFrame products were new to the market, and ClarkDietrich first licensed the products, it
16 spent significant time and resources introducing Jim Klein, the inventor of the BlazeFrame
17 products, to its industry contacts, particularly the architects and contractors, to promote the
18 products.

19 ClarkDietrich also employs teams to review databases listing publicly-bid building
20 projects nationwide, and to scrutinize the construction document specifications, including among
21 other things, the fire-proofing specifications. If this team identifies a project for which the
22 BlazeFrame products have not been specified, a member of the team works with the architect in
23 an attempt to have BlazeFrame products specified as the fire-proofing.

24 ClarkDietrich has used this same process successfully with many of its proprietary
25 products, and it has been equally successful with its BlazeFrame products. A snapshot taken this
26 summer of such a database, known as the Dodge Report, highlights the effectiveness of
27 ClarkDietrich's efforts. That report showed that among projects that specified intumescent track
28

1 products that provide the same benefits as the patented products (*i.e.*, ClarkDietrich's
 2 BlazeFrame, SaftiSeal products, and CEMCO's FasTrack products), there were 2343 jobs that
 3 specified only BlazeFrame products, 3 jobs that specified only SaftiSeal products, 280 jobs that
 4 specified only FasTrack products, 3 jobs that specified both BlazeFrame and SaftiSeal products,
 5 427 jobs that specified both BlazeFrame and FasTrack products, 5 jobs that specify both FasTrack
 6 and SaftiSeal products, and no jobs that specified all three products. Of the jobs pending at the
 7 time of the snapshot, BlazeFrame products were solely specified in about 89% of the jobs.

8
 9 With each iteration of the BlazeFrame patent license agreements, ClarkDietrich negotiated
 10 a progressively more exclusive ability to sell the patented BlazeFrame products. Having spent so
 11 much time and money building the knowledge and acceptance of the BlazeFrame intumescent
 12 track products in the market, ClarkDietrich wanted to be the sole beneficiary of its efforts.

13 3. ClarkDietrich and CEMCO Have Been Harmed by SaftiSeal

14 a. The Market for Intumescent Track Products is Limited to Three Players

15 Among passive fire-stopping products, there are three categories: traditional caulk and
 16 mineral wool, intumescent track products, and secondary field-applied products. The traditional
 17 caulk and mineral wool still dominate the overall industry. However, architects willing to use
 18 other methods typically, and consistently, gravitate to one or the other available options. To the
 19 extent an architect is willing to entertain a non-traditional passive fire-stopping option, the choice
 20 is between intumescent track products or secondary field-applied products. In other words, an
 21 architect who is willing to use something other than caulk and/or mineral wool, will typically
 22 have a preference for either intumescent track products or secondary field-applied products. Once
 23 that choice is made, and contractors are seeking bids to complete a project, it is not likely that a
 24 change will be made in the building specification. However, an architect who is comfortable with
 25 intumescent track products is more likely to entertain a request to change from, for example,
 26 BlazeFrame products to SaftiSeal products because they are viewed as equivalents.

According to Defendants, the non-traditional market comprises the following products: BlazeFrame products, SaftiSeal products, FasTrack products, Hilti Top Track Seal, STI Track Top Gasket, CEMCO FireGasket, CEMCO HotRod and HotRod XL, CEMCO Deflection Drift Angle, CEMCO FireBead, RectorSeal BlazeFoam, and RectorSeal Track-Safe. The CEMCO products (FasTrack, FireGasket, HotRod, HotRod XL, Deflection Drift Angle, and FireBead) and the RectorSeal products (BlazeFoam and Track-Safe) are each covered by patents owned by CEMCO. The STI product is covered by its patent. Thus, none of these products is an available, non-patented alternative to the Asserted Patents. In addition, ClarkDietrich's experience is that it rarely competed with either the Hilti or STI products – among other reasons because they do not provide the benefit of the patented products of saving an additional fire-stopping application step.

While the SaftiFrame product provides all the benefits of the products covered by the Asserted Patents (and all the benefits of the BlazeFrame products), arguably the SaftiStrip product does not prevent an additional fire-stopping application step. However, the market sees SaftiStrip as an intumescent track product and not a secondary-applied product largely because the SaftiSeal UL approvals for its products identify it as such. These UL approvals indicate that SaftiStrip can either be factory-applied (making SaftiFrame) or field-applied. In addition, according to emails between Defendants and their customers, and conversations ClarkDietrich has had with its customers, the market views both SaftiFrame and SaftiStrip as a replacement for BlazeFrame. Contractors and architects who have become comfortable with BlazeFrame believe that SaftiFrame and SaftiStrip is a cheaper substitute for the BlazeFrame products.

b. ClarkDietrich is Losing Sales Because of SaftiSeal's Infringement

Since about September 2017 when SaftiSeal entered the market, ClarkDietrich has lost sales of its BlazeFrame products. In 2019, its sales are about [REDACTED] less than they had been the previous year. In general, each year that it has sold BlazeFrame products, ClarkDietrich has seen an increase in sales. However, since the introduction of SaftiSeal's products, and particularly its SaftiStrip product, ClarkDietrich's sales have fallen [REDACTED]. This decline

1 is occurring even though the rest of ClarkDietrich's business, including its metal track product
2 sales, continue to increase.

3 SaftiSeal's products are designed to mimic and divert sales from ClarkDietrich's
4 BlazeFrame products. After ClarkDietrich has worked with architects and contractors to gain
5 acceptance of intumescent track products for a particular job and often had the specifications
6 updated to include BlazeFrame products for passive fire stopping, SaftiSeal and Klein swoop in
7 as the subcontractors are preparing final bids before beginning to build the project and offers a
8 cheaper substitute. SaftiSeal's sale of intumescent strip (the SaftiStrip) separate from steel track
9 products disrupts ClarkDietrich's business model of selling intumescent-applied tracks, causing
10 ClarkDietrich lost sales and pricing pressures.

11 If SaftiStrip and SaftiFrame had not appeared in the market, ClarkDietrich would have
12 sold its BlazeFrame patented product for the same jobs SaftiSeal is currently winning. In each
13 case, ClarkDietrich was selling its BlazeFrame products to be built into fire-rated wall assemblies.
14 It was not aware there was any other use for the products, and it has no UL approvals for any
15 other use of the products.

16 ClarkDietrich has identified seven specific jobs for two of its long-time BlazeFrame
17 customers (Valley Interiors and Component Assembly) where it quoted BlazeFrame products for
18 certain projects and lost those jobs to SaftiSeal. Plaintiffs have been unable to identify the specific
19 projects among SaftiSeal sales because SaftiSeal claims to be unable to identify specific projects.
20 However, each of these two customers told ClarkDietrich the jobs went to SaftiSeal. In fact,
21 Valley Interior has informed ClarkDietrich that currently it is purchasing only SaftiStrip for its
22 passive fires-stopping needs. Although it continues to sell all its other product lines to both Valley
23 and Component, ClarkDietrich has not quoted BlazeFrame products to either Valley or
24 Component in quite some time.

25 ClarkDietrich has even assisted other long-time BlazeFrame customers such as Anning-
26 Johnson to purchase the correct track profile for use with SaftiStrip. In an effort to assist a valued
27 customer, even though the customer bought from a competitor, ClarkDietrich directed Anning-
28

Johnson to the information about the necessary track profile to build a wall assembly on SaftiSeal's website in accordance with SaftiStrip UL certifications.

Finally, SaftiSeal has provided quotations for SaftiSeal products in response to requests for customers seeking "BlazeFrame" and it has shipped SaftiSeal products in response to purchase orders requesting "BlazeFrame." Clearly, customers see the SaftiSeal products as substitutes for the patented BlazeFrame products.

C. Procedural Summary

This case was originally filed in the Central District of California, where the prior cases involving these parties were heard before the Hon. Dean D. Pregerson. On May 4, 2018, the case was transferred to this District.

The Court presented its Claim Construction Order on April 17, 2019. In the Claim Construction Order, the Court construed the following terms: "intumescent strip" to mean "a strip that comprises a substance that expands when exposed to heat"; "affixed lengthwise on at least one of the outer sidewall surfaces" to mean "attached lengthwise, directly or by means of an intervening adhesive, to at least one of the outer sidewall surfaces"; and "inorganic filler" to mean "inorganic filler, including but not limited to perlite, vermiculite, expandable glasses, micas, clay, talc, borosilicates, cokes, charcoals, hard coals, brown coals, calcium carbonate, cereal grains, cork, bark granules, expandable clay, foamed concrete, metal sponge, tuff, and/or lava." (Dkt. #98.) Additionally, in the Court's Order on Summary Judgment, the Court ruled that the Safti-Strip tape is an "intumescent strip" as constructed by the Court, and the "intumescent strip" limitation reads onto the Safti-Frame products that include a strip of Safti-Strip tape.

Throughout this case, multiple Motions have been filed, including two separate Motions for Summary Judgment, Motions in Limine, and a Motion to Strike. Now that the Court has ruled on

these Motions and conducted the Pretrial Conference, the case will proceed to trial on December 9, 2019.

III. Claims Plaintiffs Will Pursue at Trial

A. Direct Patent Infringement by Safti-Seal

Plaintiffs will prove that Defendant Safti-Seal infringes at least one claim of the Asserted Patents.

As the Federal Circuit teaches, “the court first determines, as a matter of law, the correct claim scope, and then compares the properly construed claim to the accused device to determine, as a matter of fact, whether all of the claim limitations are present in the accused device, either literally or by a substantial equivalent.” *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1362 (Fed. Cir. 1999).

Here, Plaintiffs will prove that Safti-Seal directly infringes at least one claim of the Asserted Patents. The Court has already determined, as a matter of law, the correct claim scope of the key claim terms at issue, namely, “intumescent strip” and “affixed . . . on” the track product track.² The other limitations of the asserted claims are also present. Each of the tracks in the SaftiFrame products is generally U-shaped. Likewise, each of the UL approvals for SaftiSeal’s SaftiFrame and SaftiStrip products requires a generally U-shaped track to build a wall assembly. Likewise, each example on SaftiSeal’s website and each job for which ClarkDietrich lost sales of its BlazeFrame products require a generally U-shaped track to build a wall assembly.

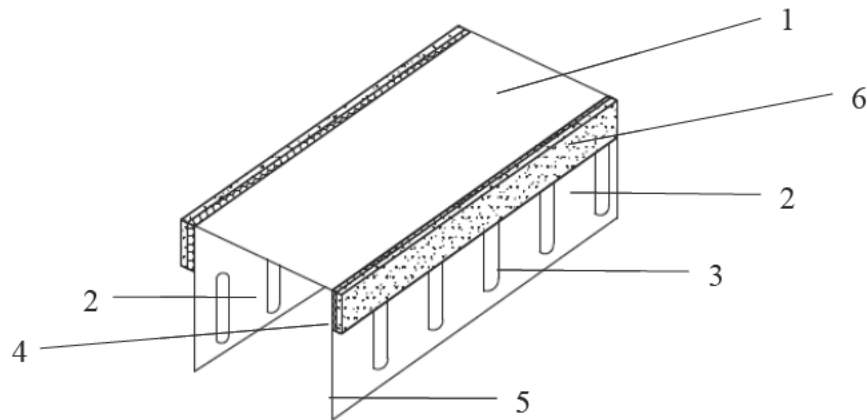
As a single example, all elements of claim 6 of the ’314 Patent are present in Safti-Seal’s PS7 – SaftiFrame DSL product. Specifically, claim 6 of the ’314 Patent recites:

“A generally U-shaped sheet-metal track, comprising:
an elongated web integrally connected to a pair of spaced apart and outwardly
extending sidewalls with the web and sidewalls defining a U-shaped profile, each
sidewall having inner and outer sidewall surfaces, each sidewall having a plurality

² See *supra* at Section II.D.

of slots positioned perpendicular to the lengthwise direction of the elongated web, each sidewall having a first sidewall portion adjacent to the web and a second sidewall portion adjacent to the first sidewall portion; and an elongated heat expandable intumescent strip affixed lengthwise on at least one of the outer sidewall surfaces of the pair of sidewalls, the intumescent strip being positioned on the first sidewall portion and not on the second sidewall portion.”

(See the '314 Patent, claim 6.) The following is a picture of the Safti-Seal PS7 – SaftiFrame DSL product (marked up for reference):



As shown here, and explained in Plaintiffs’ infringement contentions, the Safti-Seal PS7 – SaftiFrame DSL accused product is a U-shaped sheet-metal track which comprises an elongated web (1) that is connected to a pair of sidewalls (2), each sidewall having an inner and outer surface and (3) plurality of slots positioned perpendicular to lengthwise direction of the web. Each sidewall has a first sidewall portion (4) and a second sidewall portion (5) adjacent to the first sidewall portion. An intumescent strip (6) is shown being affixed lengthwise on at least one of the outer sidewall surfaces, and positioned on the first sidewall portion (4) and not the second (5). Therefore, each and every element of claim 6 of the '314 Patent is present in Safti-Seal’s PS7 – SaftiFrame DSL products, which thereby infringe claim 6 of the '314 Patent. This analysis is illustrative of claim 12 of the '718 Patent. For similar reasons, SaftiSeal’s other profiles with slotted legs, including the ODSL products, directly infringe as well.

Additionally, all of SaftiSeal’s generally U-shaped track profiles an intumescent strip (DSL, SL, DL, VT, BT, ODL, ODSL, OJR, JR, DJR, RCS, and RCD) also directly infringe Claim 1,

1 which recites, in part, the composition of the intumescent strip: “(A) from 5 to 95% by weight of
 2 expandable graphite; (B) from 1 to 70% by weight of a fire retardant; (C) from 1 to about 50% by
 3 weight of an inorganic filler dispersed in an emulsion of polyvinyl acetate or silicone.” (’314
 4 Patent, Claim 1.) Safti-Seal directly infringes this claim because U.S. Patent No. 6,207,085, to Eva
 5 Ackerman (“the Ackerman Patent”), is “incorporate[d] by reference . . . which covers “heat
 6 expandable compositions” that may serve as the intumescent strip claimed in the Patents.” (Dkt.
 7 #98 at 12:18-20.) Because the Ackerman Patent teaches the claimed composition, and intumescent
 8 strip sold by Rectorseal and used by Safti-Seal is covered by the Ackerman Patent, Safti-Seal also
 9 infringes the Claim 1 of the ’314 Patent.
 10

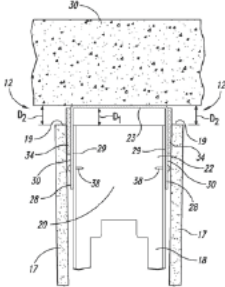
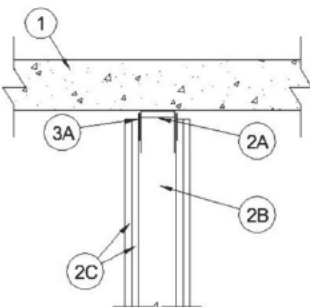
11 Based on the foregoing, Plaintiffs have suffered damages as a result of Defendants’
 12 infringement of at least one claim of the Asserted Patents by Safti-Seal’s accused products.

13 **B. Induced Patent Infringement by Defendants Safti-Seal and Klein-**

14 Plaintiffs will prove that Defendants Klein and Safti-Seal induce third parties to infringe at
 15 least one claim of the Asserted Patents. Additionally, Klein directed Safti-Seal to induce
 16 infringement of the Asserted Patents, and, thus, Klein is personally liable for the induced
 17 infringement of the Asserted Patents, and, thus, Klein is personally liable for the induced
 18 infringement of the Asserted Patents. *See Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806
 19 F.2d 1565, 1578–79 (Fed. Cir. 1986) (“[I]t is well settled that corporate officers who actively aid
 20 and abet their corporation's infringement may be personally liable for inducing infringement under
 21 § 271(b) regardless of whether the corporation is the alter ego of the corporate officer.”); *see also*
 22 *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990) (noting
 23 that “corporate officers who actively assist with their corporation’s infringement may be
 24 personally liable for inducing infringement regardless of whether the circumstances are such
 25 that a court should disregard the corporate entity and pierce the corporate veil.”) (emphasis
 26 omitted).
 27
 28

Inducement to infringe is defined by 35 U.S.C. § 271(b), which states that “[w]hoever actively induces infringement of a patent shall be liable as an infringer.” 35 U.S.C. § 271(b) (2000). In order to succeed on a claim of inducement, the patentee must show, first that there has been direct infringement, *Epcon Gas Sys., Inc. v. Bauer Compressors, Inc.*, 279 F.3d 1022, 1033, (Fed. Cir. 2002), and second that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another’s infringement. *Minnesota Min. & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1304–05 (Fed. Cir. 2002).

Here, Plaintiffs will show that there has been direct infringement of the Asserted Patents by the customers and installers of the Safti-Strip and Safti-Frame products. Defendants instruct their customers (direct infringers) to construct wall assemblies in accordance with the UL Listings such that the end-product will be certified fire-safe pursuant to the UL safety standards. Klein also issues Engineering Judgements as “Technical Director” of SaftiSeal, confirming that certain wall assemblies comply with UL standards. Once these wall assemblies are constructed according to the specification of the UL Listings or Klein’s Engineering Judgment, the assemblies directly infringe at least one claim of the Asserted Patents. For example, the Fig. 3A of the ’365 Patent has the same configuration of UL Report UL XHBN - Joint System No. HW-D-0498, which is available on SaftiSeal’s website:

The ’365 Patent	UL XHBN - Joint Systems System No. HW-D-0498
 <p>Fig. 3A</p>	

The '365 Patent	UL XHBN - Joint Systems System No. HW-D-0498
Fig. 3A shows an exemplary embodiment of the fire retardant dynamic head-of-wall assembly of the '365 Patent	This UL Listing configuration generally shows each of the elements shown in Fig. 3A of the '365 Patent.

Additionally, both Klein and Safti-Seal knowingly induced infringement and possessed the specific intent to encourage the customers' infringement, as Klein himself is the inventor of the Asserted Patents. Klein himself also knew the patent claims and that the UL Reports substantially aligned with the Asserted patent. Therefore Defendants Klein and Safti-Seal induced infringement of the Asserted Patents.

Plaintiffs have suffered damages as a result of Defendants inducing infringement of the Asserted Patents.

C. Contributory Patent Infringement by Defendants Safti-Seal and Klein-

Plaintiffs will prove that Defendants Klein and Safti-Seal contributorily infringe at least one claim of the Asserted Patents. Additionally, Klein is personally liable for the contributory infringement of the Asserted Patents. *See Wordtech Sys., Inc v. Integrated Networks Sols., Inc.*, 609 F.3d 1308, 1317 (Fed. Cir. 2010) ("As with inducement, a corporation does not shield officers from liability for personally participating in contributory infringement.")

The Federal Circuit teaches that to establish contributory infringement, the patent owner must show: 1) that there is direct infringement, 2) that the accused infringer had knowledge of the patent, 3) that the component has no substantial non-infringing uses, and 4) that the component is a material part of the invention. *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1326 (Fed. Cir. 2010).

Here, customers and end-users of the Safti-Strip and Safti-Frame products directly infringe the Asserted Patents by constructing wall assemblies in accordance with the UL Listings provided by Defendants, which instruct end-users to assemble the assemblies in a directly infringing manner. Klein has knowledge of the Asserted Patents, as he is the inventor of the Asserted Patents as described above.

Furthermore, the Safti-Strip and Safti-Frame products do not have any substantial non-infringing uses, and Klein and Safti-Seal only instructs customers to use the Safti-Frame and Safti-Tape products in an infringing way. The Court has even struck evidence from Klein attempting to describe such non-infringing uses. (Dkt. #117 at 13:7-8.) Indeed, the Safti-Strip and Safti-Frame products are critical components for the wall assemblies, which serve to prevent the spread of smoke and fire. This allows the products to be fire-safe in accordance with the UL Listings and Certifications.

Plaintiffs have suffered damages as a result of Defendants contributory infringement of the Asserted Patents.

D. Damages

1. ClarkDietrich and CEMCO are Entitled to Lost Profits

A patentee (or in the present case, an exclusive licensee) is entitled to profits it has lost as a result of patent infringement if he can show that, but for the infringement, he would have made the sales made by the accused infringer. *Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1543 (Fed. Cir. 1987). “[T]he availability of lost profits is a question of law for the court, not the jury.” *Wechsler v. Macke Int’l Trade, Inc.*, 486 F.3d 1286, 1293 (Fed. Cir. 2007).

“To prove lost profits from lost sales, the patent owner bears the initial burden to show a reasonable probability that ‘but for’ the infringement, he would have made the sales. Once this reasonable probability is shown, the burden shifts to the infringer to show that the ‘but for’ causation analysis is unreasonable under the specific circumstances.” *Amer. Seating Co. v. USSC*

1 *Grp.*, 514 F.3d 1262, 1269 (Fed. Cir. 2008). “Although the parties must support their positions
2 with sound economic proof, absolute certainty is not required, for reconstruction of the ‘but for’
3 market is ‘by definition a hypothetical enterprise’ based on the evidence introduced at trial.”

4 *Fiskars, Inc. v. Hunt Mfg.*, 279 F.3d 1378, 1383 (Fed. Cir. 2002).

5 “To obtain as damages the profits on sales he would have made absent the infringement,
6 *i.e.*, the sales made by the infringer, a patent owner must prove (1) demand for the patented
7 product, (2) absence of acceptable non-infringing substitutes, (3) his manufacturing and
8 marketing capability to exploit the demand, and (4) the amount of the profit he would have
9 made.” *Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir. 1978).

10 a. There was Demand for the Patented Products

11 As shown below, ClarkDietrich’s increasing sales of the patented BlazeFrame products
12 each year during the relevant time frame of 2016 through 2018 show strong demand for the
13 patented products. While ClarkDietrich’s sales dropped in 2019, that is directly attributed to
14 SaftiSeal’s increasing presence in the market, where its sales more than doubled from 2018 to
15 2019.

16 **Revenue Of ClarkDietrich’s BlazeFrame Products And**
17 **Safti-Seal’s Accused Products**



The Federal Circuit considers “a substantial number of sales” of infringing products containing the patented features to be, itself, “compelling evidence” of the demand for the patented product. *Gyromat Corp. v. Champion Spark Plug Co.*, 735 F.2d 549, 552 (Fed. Cir. 1984). In addition to SaftiSeal’s “substantial” and increasing sales of the infringing products, its own expert Daniel Lindsay agrees that there is demand for the patented products. In light of the significant sales of patented products by both ClarkDietrich and SaftiSeal, there is no question that there is demand for the patented products. *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1330 (Fed. Cir. 2009).

b. There is an Absence of Acceptable Non-infringing Substitutes

To be an acceptable, non-infringing substitute, a product must have the advantages of the patented invention that were important to people who purchased an alleged infringer’s product.” *Am. Seating Co. v. USSC Grp.*, 514 F.3d 1262, 1270 (Fed. Cir. 2008). The correct inquiry is whether a non-infringing alternative would be acceptable compared to ClarkDietrich’s patented BlazeFrame product, not whether it is a substitute for the infringing SaftiSeal product. *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 875 F.3d 1369, 1381 (Fed. Cir. 2017). The ‘but for’ inquiry therefore requires a reconstruction of the market, as it would have developed absent the infringing product, to determine what sales ClarkDietrich would have made. *Id.*

A primary benefit of the patented products is that it does not require an additional construction step to apply the fire-stopping intumescent material and that material is applied in a controlled dosage. The only products that provide such benefits are the BlazeFrame products, the SaftiSeal products, and the FasTrack products. Although one could argue that the SaftiStrip, which can be field-applied after the track has been installed, does not provide this step-saving benefit. However, it is marketed as an intumescent track product and its UL approvals permit both factory application and field application (before or after track installation) of the intumescent strip. Thus, the only acceptable non-infringing alternatives to the patented product are the FasTrack products, which themselves are patented. The only, un rebutted evidence is that the FasTrack products have

1 about 11% of the market. As such, if SaftiSeal had never be in the market, ClarkDietrich would
2 have made about 89% of the sales of intumescent track products.

3
4 The substitutability of SaftiSeal for BlazeFrame is evident from SaftiSeal's own marketing
5 and customer communications. When SaftiSeal first began, it trumpeted its new SaftiSeal products
6 as a product that can "replace old BlazeFrame." SaftiFrame and SaftiStrip were positioned as a new
7 version of BlazeFrame.

8 ClarkDietrich has provided evidence of specific jobs for which it quoted BlazeFrame for
9 fire-proof wall assemblies, only to lose the jobs to SaftiSeal. Two large customers of ClarkDietrich
10 have not requested a quotation for BlazeFrame for some time, even though they continue to buy
11 other products from ClarkDietrich. One of these customers has told ClarkDietrich that it only
12 purchases SaftiStrip for its passive-fireproofing. In 2019, ClarkDietrich's sales of BlazeFrame
13 products fell for the first time in years, even as SaftiSeal products sales increase.

14
15 ClarkDietrich sold its BlazeFrame product only for incorporation into patented wall
16 assemblies. It is more likely than not that the SaftiSeal products are similarly going into such
17 patented wall assemblies. Plaintiffs are unable to identify the type of project for each SaftiSeal sale
18 because Klein and SaftiSeal claim not to keep such records. Any doubts that arise because of the
19 inadequacy of Klein's or SaftiSeal's records should be resolved against Defendants and not
20 Plaintiffs. *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1572-73 (Fed. Cir. 1996).

21 SaftiSeal may argue that the secondary field-applied products are also suitable alternatives
22 to the patented products. As an initial matter, all but two of these products (the Hilti and STI
23 products) are covered by patents owned by plaintiff CEMCO. And the STI patent is covered by
24 STI's patent. Thus, none of those products are "non-infringing", freely available substitutes. In
25 addition, none of these products offer the benefits of the patented products. In particular, they each
26 necessitate an additional post-track installation step of inserting a secondarily applied fire-proofing
27 product.

1 SaftiSeal also may argue that because its products meet the requirements of the so-called
 2 version 5 of the UL fireproofing test with no additional materials required, ClarkDietrich's
 3 BlazeFrame products cannot compete with the SaftiSeal product. However, that is the wrong
 4 analysis. The proper question is how would the market have developed *absent* the introduction of
 5 the accused product. *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 875 F.3d 1369, 1381
 6 (Fed. Cir. 2017). First, it is unclear whether version 5 is even applicable because the current
 7 international building code applies only version 4, or whether it has become an issue only because
 8 Klein and SaftiSeal have chosen to emphasize it for marketing purposes. Second, the BlazeFrame
 9 products comply with version 5 with the addition of either a generic backer rod or ClarkDietrich's
 10 perimeter L-bead product. In either case, neither product interferes with the benefits of the patented
 11 products. Either piece is applied at the same time as the finishing of the wallboard, without the need
 12 for an additional installation step or hiring of specialty tradesman, as is true with the traditional
 13 caulk or mineral wool. Thus, absent SaftiSeal's infringement, the market would have either
 14 continued using UL version 4, or accepted ClarkDietrich's modified product. Either way, the
 15 industry would have continued buying BlazeFrame products.

16 c. ClarkDietrich has the Necessary Marketing and Manufacturing Capacity

17
 18 ClarkDietrich has a nationwide marketing organization that focuses on increasing the
 19 opportunities for, among other products, the BlazeFrame products. As shown by its hundreds of
 20 educational programs for architects and contractors, and its success as quantified by the thousands
 21 of job specifications exemplified in the Dodge Report, if SaftiSeal had not been in the market,
 22 ClarkDietrich's marketing organization could turn opportunities into sales. In fact, ClarkDietrich's
 23 marketing successes have more likely made SaftiSeal's sales efforts easier – ClarkDietrich has
 24 promoted acceptance of intumescent track products and SaftiSeal has capitalized on that growing
 25 acceptance. Thus, ClarkDietrich has the marketing capacity to make all sales that SaftiSeal made.

26
 27 ClarkDietrich's manufacturing capacity has easily kept pace with its growing BlazeFrame
 28 sales. Because it has manufacturing of the patented BlazeFrame products spread across 14 facilities

throughout the United States, it could easily have increased its output of products without incurring additional expense (other than the cost of the raw materials for the products themselves). Thus, ClarkDietrich easily has the manufacturing capacity to make all sales that SaftiSeal made.

d. ClarkDietrich's Lost Profits are Quantifiable

ClarkDietrich's expert has calculated its lost profits by determining the revenue ClarkDietrich makes per foot of BlazeFrame product sold and subtracting from that figure the amount of additional costs or expenses it would have incurred in making those lost sales. *Paper Converting Mach. Co. v. Magna-Graphics Corp.*, 745 F.2d 11 (Fed. Cir. 1984). She then applied that revenue to 89% of SaftiSeal's sales (ClarkDietrich's lost sales resulting from the SaftiFrame and SaftiStrip sales), taking into account that some of the SaftiStrip product is used on a product with intumescent applied to only one side of the track and some is used on a product with intumescent applied to both sides of the track. She then calculated CEMCO's lost profits based on its lost royalty revenues from ClarkDietrich. The result is that ClarkDietrich has lost profits of [REDACTED] dollars and CEMCO has lost profits of [REDACTED] dollars. For the 11% of SaftiSeal sales for which the Plaintiffs are not seeking lost profits, ClarkDietrich is also entitled to [REDACTED] and CEMCO is also entitled to [REDACTED] in reasonable royalties (both calculated at [REDACTED]/foot of SaftiSeal product). *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1577 (Fed. Cir. 1989)(stating that "the award may be split between lost profits as actual damages to the extent they are proven and a reasonable royalty for the remainder.").

2. Alternatively, ClarkDietrich and CEMCO are Entitled to a Reasonable Royalty

A patentee is entitled to no less than a reasonable royalty. 35 U.S.C. §284. A reasonable royalty is often determined by positing a hypothetical negotiation between a willing licensor of the patent and a willing licensee. *Panduit Corp.*, at 1158-59. "The willing licensee/licensor approach must be flexibly applied as a 'device in the aid of justice.'" *TWM Mfg. v. Dura Corp.*, 789 F.2d 895, 900 (Fed. Cir. 1986). In determining this hypothetically negotiated royalty, courts typically

look at the relevant circumstances, as captured by what are known as the 15 *Georgia Pacific* factors. *Georgia Pacific Corp. v. United States Plywood Corp.*, 318 F.Supp. 1116 (S.D.N.Y.), *modified by* 446 F.2d 295 (2nd Cir. 1971). Neither the patentee's nor the infringer's net profit margin is a ceiling on a reasonable royalty. *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1238-39 (Fed. Cir. 2011).

In the present case, in any hypothetical negotiation, ClarkDietrich would necessarily have to give up its exclusivity in the patented products. It would also want to protect the sizeable investment it has made in the BlazeFrame product line. Finally, it would seek to maintain its preferred product form of factory-assembled intumescent track products sold through channels of distribution. To do so, it would need to discourage sales of SaftiStrip and encourage sales of only SaftiFrame products, and it would seek to minimize the pricing advantage Klein and SaftiSeal enjoy by selling directly to contractors rather than through distributors. Thus, the parties to the hypothetical negotiation would negotiate a royalty rate that would meet these needs of ClarkDietrich and CEMCO, and reduce SaftiSeal's pricing advantages, while still leaving SaftiSeal with some pricing advantage. The resulting reasonable royalty, as explained in greater detail by Plaintiffs' damages expert is [REDACTED]/ft of SaftiSeal product sold. Thus, if ClarkDietrich and CEMCO are not awarded lost profits as explained above, then ClarkDietrich is entitled to [REDACTED] in reasonable royalties and CEMCO is entitled to [REDACTED] in reasonable royalty damages.

E. Willful Patent Infringement

Plaintiffs will prove that Defendants Klein and Safti-Seal's conduct was willful, and thus enhanced damages will be proper to deter future infringement of the Asserted Patents by Defendants.

To show that the Patent Infringement was willful, Plaintiffs must first show "by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent, without regard to the state of mind of the accused infringer." *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923, 1930 (2016) (internal

1 quotations omitted). Then Plaintiffs must show, “again by clear and convincing evidence—that the
2 risk of infringement was either known or so obvious that it should have been known to the accused
3 infringer.” *Id.* If both steps are satisfied, then the District Court can exercise its discretion to award
4 enhanced damages. *Id.*

5 Here, Defendants clearly made and sold their Safti-Strip and Safti-Frame products despite
6 an objectively high likelihood that they infringed the Asserted Patents. The risk of infringement
7 was objectively high before the litigation began, and has only increased as the litigation progressed.
8 Specifically, the Court’s Claim Construction Order significantly raised the risk of infringement
9 based upon the construction of “intumescent strip” and “affixed . . . on,” yet Defendants’ dug in
10 their heels and continued promoting and selling the Accused Products. In fact, sales of the Accused
11 Products have increased significantly in 2019. Then, the risk of infringement grew more after the
12 Summary Judgment Order specifically ruling that the claimed term “intumescent strip” read onto
13 the Safti-Strip product. Yet, Defendants continue to make and sell the products which are
14 objectively very likely to infringe the Asserted Patents after *two* Court orders. If Defendants did
15 not willfully infringe the patents after April 17, then they certainly infringed after the Court’s
16 summary judgment order dated August 14.

17 Additionally, the risk of infringement was so obvious or should have been so obvious to
18 Defendants, and specifically Klein, as he was the inventor of the Asserted Patents and knew his
19 simple addition of a “thermal barrier” constituted an obvious risk of infringement. This should
20 have become even more obvious in light of the Claim Construction Order and Summary Judgment
21 Order for the reasons stated above. Yet, Defendants continue promoting and selling the Accused
22 Products in light of these facts.

23 Therefore, Plaintiffs should be awarded enhanced damages by the Court due to this willful
24 infringement.

F. Exceptional Case Standard

Plaintiffs will prove that this is an exceptional case of Patent Infringement, and thus Plaintiffs’ attorneys’ fees should be paid by Defendants.

As stated by the Supreme Court, “an exceptional case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). “District courts may determine whether a case is ‘exceptional’ in the case-by-case exercise of their discretion, considering the totality of the circumstances.” *Id.*

Here, it is important to consider this case should have been settled or disposed of after the Claim Construction Order, and definitely after the Summary Judgment Order essentially ruled that Defendants’ Safti-Strip and Safti-Frame products read directly onto the only disputed terms of the Asserted Patents (i.e. “intumescent strip” and “affixed . . . on”). This places Plaintiffs’ position at trial significantly stronger than that of Defendants. Defendants have even attempted to make, in the Court’s words, a “nonsensical and disingenuous” interpretation of the Summary Judgment Order, arguing that the Court granted Defendants’ Motion for Summary Judgment on literal infringement, thereby doing away with each and every claim of literal infringement.³

Instead of analyzing the strengths and weaknesses of their litigation positions in light of the Court’s orders, Defendants have needlessly caused Plaintiffs additional attorneys’ fees responding to frivolous arguments, and filing motions to clarify their misguided interpretations of the Court’s clear orders. For example, Defendants’ arguments were rejected on numerous occasions, including the Defendant’s invalidity arguments (regarding patents Klein and BlazeFrame Ind. previously owned) and inequitable conduct before the United States Patent and Trademark Office in

³ See Dkt. #134: Order on Plaintiffs’ Motion for Clarification

1 prosecuting his own patents. The Court struck these affirmative defenses under assignor estoppel
2 theories. (Dkt. #91.)

3 Lastly, the context of this *third* litigation involving these parties is critical. Defendants have
4 made it clear that they will go to great lengths to impermissibly practice the very patents they sold
5 to CEMCO. Based on the foregoing, Plaintiffs should be awarded attorneys' fees as this case is
6 exceptional under the exceptional case standard set forth in *Octane Fitness*.

7 **IV. Defendants' Affirmative Defenses**

8 In the Pretrial Order, Defendants outline five "affirmative defenses." Specifically,
9 Defendants claim (1) no direct infringement, (2) no contributory infringement, (3) no induced
10 infringement, (4) failure to join, and (5) failure of causation.

11 **A. Direct, Contributory, and Induced Infringement Affirmative Defenses are Improper**

12 As an initial matter, these are improper affirmative defenses because Plaintiffs carry the
13 burden of proving infringement. Regardless, Plaintiffs' positions regarding these issues are set
14 forth above.
15

16 **B. Failure to Join Affirmative Defense Is Not Supported by Facts**

17 Defendants contend that Plaintiffs' claims are barred because the damages caused were the
18 result of actions or non-actions of other parties not named in this lawsuit. However, Defendants
19 fail to point to any specific facts supporting this affirmative defense, and fail to mention any other
20 party which may have caused Plaintiffs' damages. Therefore, Defendants will be unsuccessful on
21 their defense of failure to join.
22

23 **C. Failure of Causation Affirmative Defense Is Not Supported by Facts**

24 Defendants contend that Plaintiffs are not entitled to damages because Plaintiffs' own
25 conduct proximately caused their damages. However, as with their failure to join defense,
26 Defendants fail to point to any specific evidence that Plaintiffs have somehow caused their own
27
28

1 patent infringement and breach of contract damages. Instead, Defendants rely upon their
 2 boilerplate language in their Amended Answer without providing additional facts or circumstances
 3 as to why they believe Plaintiffs proximately caused their own damages.

4 Therefore, Defendants will be unsuccessful in their defense of failure of causation.

5 **V. Conclusion and Relief Requested**

6 Throughout the litigious history of these Parties, Defendants, and specifically Klein, has
 7 sought to practice the very Asserted Patents he sold. After the first dispute, Plaintiffs attempted
 8 to allow Klein to still practice his patents in a reasonably large territory. However, he chose to
 9 ignore the settlement and breached its terms by selling outside his designated territory. Then,
 10 Defendants and Klein agreed to leave the marketplace and to stop making and selling the patented
 11 products, an agreement he again ignored by adding a “thermal barrier” to his prior products and
 12 selling it under a different name. Based on the foregoing, Defendants must be held liable for their
 13 patent infringement and breach of contract.
 14
 15

16
 17 Respectfully submitted,
 18 TROJAN LAW OFFICES
 19 by

20 December 2, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December 2019, I caused to have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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